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Verizon California, Inc. and Communications Workers of America, Local 9588, AFL–CIO. Case 21–CA–039382

August 19, 2016

DECISION AND ORDER REMANDING

BY CHAIRMAN PEARCE AND MEMBERS HIROZAWA
AND MCFERRAN

The issue in this case is whether deferral to an arbitration award is appropriate pursuant to *Spielberg Mfg. Co.*, 112 NLRB 1080 (1955), and *Olin Corp.*, 268 NLRB 573 (1984).¹ We find, contrary to the judge, that deferral is not appropriate.² Accordingly, we shall remand this proceeding to the Region for further appropriate action.

I. OVERVIEW

Employee Bryan Rodriguez was suspended for insubordination for refusing to continue a telephonic interview after his *Weingarten*³ request for union representation was denied. Rodriguez grieved his suspension, and an arbitrator found that Rodriguez was not entitled to *Weingarten* representation because his belief that discipline might result from the questioning was “unreasonable, considering all of the facts as presented.” Accordingly, the arbitrator found that Rodriguez was suspended for just cause. Applying *Spielberg Mfg. Co.*, supra, and *Olin Corp.*, supra, the judge deferred to the arbitration award, finding that the arbitrator’s decision was “susceptible of an interpretation consistent with the Act.” The General Counsel and the Union except, arguing that deferral was not appropriate because the arbitrator misapplied *Weingarten* and therefore the award was palpably wrong and repugnant to the Act.

¹ In *Babcock & Wilcox Construction Co.*, 361 NLRB No. 132 (2014), the Board modified its post-arbitral deferral standards in Sec. 8(a)(3) and (1) cases, but decided to apply its new standards prospectively only. Thus, the *Spielberg/Olin* standards are applicable to this case.

² On March 20, 2014, Administrative Law Judge Mary Miller Craft issued the attached decision. The General Counsel and the Charging Party each filed exceptions and a supporting brief, and the Respondent filed an answering brief. The General Counsel filed a reply brief, which the Charging Party joined.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge’s rulings, findings, and conclusions only to the extent consistent with this Decision and Order Remanding.

³ *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 256–257 (1975).

II. FACTS

Rodriguez, a field technician II working out of the Respondent’s Pomona, California yard, installs and repairs customer communications equipment and systems. His immediate supervisor is Pomona yard Local Manager Brenda Cooper.

The Respondent’s work rules provide that field technicians are required to call their local manager if a job takes more than 1.8 hours to complete. The rules further provide that “[a]ll the above work rules are to be followed by all employees in the Gateway District. Failure to adhere to these rules could subject you to disciplinary action up to and including termination.” Rodriguez received a copy of that document in January 2010. The parties’ collective-bargaining agreement also provides that disciplinary action may be taken if more than two work rule infractions are identified through GPS reports.⁴

On June 2, 2010, Rodriguez was placed on a performance improvement plan (PIP) that included several targeted objectives. Among those objectives were (1) a requirement that Rodriguez improve productivity (jobs per day or JPD), and (2) a requirement that Rodriguez follow all work rules and contact his manager on all long-duration jobs, i.e., jobs that take more than 1.8 hours to complete.⁵ The PIP’s “action plan” required Rodriguez to contact Cooper on any “long-duration” ticket, and further provided that Rodriguez’s performance would be measured daily and that immediate improvement was expected. The PIP also provided for further corrective action, up to and including dismissal, for failure to meet expectations in the future.

On June 3, the PIP having only just been imposed, Cooper counseled Rodriguez regarding his failure to call her when he was working on a long-duration job the previous day.⁶ Cooper told him that, pursuant to the work rules and PIP, he was required to call to let her know that he had a long-duration ticket. Rodriguez testified that Cooper said that “it’s an expectation and a directive. . . . If I don’t follow any of those guidelines, it could lead to discipline up to termination.”

On the morning of June 8, Cooper had a 45-minute discussion with Rodriguez during which she questioned him at length about his “stops and everything from the

⁴ The Respondent uses GPS to track its technicians when they are out on jobs.

⁵ In 2009, Rodriguez had been placed on a similar PIP to improve his productivity. Although Rodriguez did not achieve the productivity goals in that PIP, the PIP was terminated when Rodriguez showed some improvement. The 2009 PIP stated, “Move to steps of discipline if required improvement is not met.”

⁶ Cooper testified that counseling, discussing, and coaching all mean talking to the employee and are not considered to be disciplinary actions.

day before.” Rodriguez testified that he was “upset that she was constantly harassing [him] every day.” That afternoon, Rodriguez worked a long-duration job but did not call in. Cooper already knew that Rodriguez would be working that job, however, and an extra ticket had been written to cover it.

Nevertheless, because of the PIP and his previous June 3 counseling and June 8 discussion, Rodriguez was concerned that he might be disciplined because of the duration of the June 8 job and his failure to call in. He contacted the Union and arranged to meet with a union representative before work on June 9. That morning, the representative instructed Rodriguez about his *Weingarten* rights. Later that day, Cooper was preparing a summary (SABIT) report for June 8 and noted from GPS information that Rodriguez made two stops before arriving at the previously arranged long-duration call. To complete the report, Cooper needed an explanation for the two stops, and she left a message for Rodriguez to call her. Rodriguez returned the call 5 minutes later and Cooper asked him to explain the stops. Rodriguez responded that he did not feel comfortable discussing the matter without a union representative, but Cooper refused to permit a union representative to be present or participate in the conversation. When Rodriguez continued to refuse to answer she directed him to return to the yard. At the yard, she suspended Rodriguez for 1 day for refusing to answer questions about the job ticket.

Cooper testified on direct examination that she had simply wanted an explanation for the two stops and that she frequently called technicians, including Rodriguez, for explanations needed to complete her daily reports. Cooper’s contemporaneous notes state, however, that she also wanted Rodriguez to explain the long-duration job pursuant to the PIP.⁷ On cross-examination, Cooper testified that she told Rodriguez that “the reason for the call was because of the jobs per day and the one ticket that took 5.7 hours.” Cooper conceded that she did not tell Rodriguez that the conversation would not lead to discipline. Rodriguez testified that he had received these calls in the past and had not been disciplined, but he was concerned this time because he was on the PIP and had already been warned on June 3 about the failure to call in.

On June 11, 2010, the Union filed a charge alleging that the Respondent unlawfully denied Rodriguez his

Weingarten right to union representation during the interview with Cooper. The Region initially deferred further processing of the charge pursuant to *Collyer Insulated Wire*, 192 NLRB 837 (1971), and on January 17 and February 16, 2012, the Respondent and the Union arbitrated the grievance.

III. THE ARBITRATOR’S AWARD

In finding just cause for the suspension, the arbitrator stated:

This case is fairly straightforward and really must be determined based on the “rule of reasonableness.” Here, the Union’s argument is that whenever an employee subjectively believes that a discussion with Management could result in discipline, then he has a right to Union representation. In its extreme, this could mean every employee, at all times, when receiving a communication, whether orally or in writing, from a supervisor or manager could refuse to respond. Some employees, perhaps have such a “guilt complex” that they unreasonably believe that discussion could result in discipline. Here, Cooper’s testimony was too credible and believable regarding her attempt to obtain objective information with regard to her report-writing responsibilities. While in fact, discipline can result in discussions with employees, that does not give rise to an obligation by Management or a right by employees to have Union representation. The *Weingarten* criteria and standards are laid out in the detailed exposition of Arbitrator William Petrie in [the Walker award⁸] that the Undersigned adopts his rationale and discussion specifically regarding *Weingarten* and attaches it to this award so that the reader, whether the parties or NLRB representatives, can incorporate his reasoning in their analysis as well.

In summary of his conclusions on this matter, the Undersigned believes the Company exercised its rights reasonably in denying Rodriguez Union representation when Cooper was soliciting information from him regarding his long-duration job. The expectation that he might be disciplined as a result of Cooper’s inquiry was

⁷ Cooper’s notes state: “Called Bryan to review 6/8 JPD (1) ticket 5.7 hr 12:00 pm–5:42. Bryan stated he didn’t feel comfortable talking to supervisor without union rep. Explained to Bryan this is the detail I need for my SABIT call + he needs to explain long duration tickets as stated on PIP/work rules. Bryan said he was instructed by Union D. Goodwin not to talk to me without a union rep. I denied to involve union when getting details of long duration ticket—just normal conversation. . . .”

⁸ The Respondent introduced into the arbitral record an arbitration award, the Walker award, involving employee Wanda Walker, who had been suspended for insubordination for refusal to participate in an investigatory meeting without a *Weingarten* representative. In that case, the arbitrator concluded, based on credibility determinations, that the employee did not have an objectively based, reasonable belief that participation in the requested meeting could have led to discipline. The Walker arbitrator credited the manager’s testimony that she specifically informed the employee that no disciplinary action would be taken as a result of the questioning.

unreasonable, considering all of the facts as presented. The grievance will be denied.

The Region issued a complaint alleging a *Weingarten* violation and an unlawful suspension in violation of Section 8(a)(3) and (1) of the Act. The complaint alleged that the award was “repugnant to the Act [because] the arbitrator misapplied or incorrectly enunciated statutory principles as well as failed to consider fully the import of discriminatee-Rodriguez’s PIP on the issues before him.” In lieu of a hearing, the judge granted the Respondent’s motion to adopt the record in the arbitration proceeding and allow the parties to brief the deferral issue.

IV. JUDGE’S DECISION

The judge dismissed the complaint, finding that deferral was appropriate. Applying the *Spielberg/Olin* standards, the judge concluded that the award was not repugnant to the Act because it was “susceptible of an interpretation consistent with the Act.”

Although the judge recognized that the General Counsel and the Union made a “solid argument for finding an objectively based reasonable belief that discipline could result” based on the PIP and Cooper’s failure to state that no discipline would result from the questioning, she concluded that the award was nonetheless susceptible to an interpretation consistent with the Act. In so concluding, the judge relied in part on the arbitrator’s crediting of Cooper’s testimony. She found that “the award may be understood to find that Rodriguez’ belief that discipline might result was unreasonable because the entire tenor of Cooper’s credited testimony is that she only wanted the information about two stops shown by GPS in order to complete an internal report” and that the “GPS information she sought had nothing to do with Rodriguez’ PIP or his prior warning.”

V. ANALYSIS

The Board will defer to an arbitration award under *Spielberg* when (1) the proceedings appear to have been fair and regular, (2) all parties have agreed to be bound by the award, (3) the arbitrator considered the unfair labor practice issue that is before the Board, and (4) the decision of the arbitrator is not clearly repugnant to the purposes and policies of the Act. In *Olin*, the Board clarified that an arbitrator has adequately considered the unfair labor practice issue if (1) the contractual issue is factually parallel to the unfair labor practice issue, (2) the arbitrator was presented generally with the facts relevant to resolving the unfair labor practice, and (3) the decision is susceptible to an interpretation consistent with the Act. *Smurfit-Stone Container Corp.*, 344 NLRB 658, 659–660 (2005), citing *Olin*, supra, 268 NLRB at 574. An arbitra-

tor’s award will not be found repugnant merely because the award is not totally consistent with Board precedent. It will, however, be found repugnant if it is “palpably wrong” or not susceptible to an interpretation consistent with the Act. *Olin*, supra, 268 NLRB at 574.⁹ Under *Olin*, the burden is on the party opposing deferral to demonstrate that the standards for deferral have *not* been met. 268 NLRB at 574, 575.

The parties agree, and the judge found, that the first three *Spielberg/Olin* factors were met in this case. Thus, this case turns on whether the arbitrator’s award is repugnant to the Act, i.e., not susceptible to an interpretation consistent with the Act or “palpably wrong.”

A.

In arguing against deferral, the General Counsel and the Union rely on the arbitrator’s failure to consider the impact of the PIP, which expressly stated that further work rule violations could lead to discharge, and the fact that Rodriguez had already been counseled twice, recently, about his failure to follow the dictates of the PIP. They contend that the PIP and those counselings are critical facts that rendered the Respondent’s questioning of Rodriguez about his long-duration jobs more than merely investigatory, and caused Rodriguez to reasonably believe that discipline might ensue.

The General Counsel and the Union further contend that the arbitrator erred in focusing on Cooper’s intention in questioning Rodriguez, not on how Rodriguez would reasonably perceive the questioning. The arbitrator credited and relied on Cooper’s testimony that her telephone call to Rodriguez was intended solely to obtain information about stops he made on the day in question, and was not for the purpose of ascertaining why he did not call in on the long-duration job or otherwise comply with the PIP. Cooper’s contemporaneous notes of the conversation, however, show that she called Rodriguez in part to ask him to explain the long-duration ticket, as his PIP required. The General Counsel and the Union argue that the arbitrator erred by ignoring the fact that Cooper was attempting to ascertain, through her questioning of Rodriguez, whether he was complying with the PIP. The General Counsel argues that “this conversation was precisely the type of investigatory interview to which *Weingarten* rights would attach, since there was abundant evidence that the conversation was ‘sufficiently linked to a real prospect of discipline.’”

⁹ See also *Smurfit-Stone Container Corp.*, supra, 344 NLRB at 660; *Aramark Services*, 344 NLRB 549, 550 (2005); *Motor Convoy*, 303 NLRB 135, 137 (1991); *Dennison National Co.*, 296 NLRB 169, 170 (1989); *Postal Service*, 275 NLRB 430, 432 (1985).

The General Counsel further points out that *Weingarten* requires “reasonable belief” to be measured by “objective standards, under all the circumstances of the case.” 420 U.S. at 257 fn. 5. The General Counsel contends that the arbitrator, by ignoring objective factors such as the import of the PIP and the recent counselings, and by mischaracterizing Cooper’s phone call as a mere “attempt to obtain objective information with regard to her report-writing responsibilities,” misapplied the facts and the law and reached a conclusion that cannot be supported by any reasonable interpretation of the Act.

The Respondent argues that the arbitrator’s award was not repugnant to the Act. The Respondent claims that the General Counsel and the Union “seek to substitute their own viewpoint for the Arbitrator’s factual conclusions, witness credibility determinations, and holding that Rodriguez did not have a reasonable belief that discipline would result from participating in a routine conversation with his supervisor.” The Respondent further contends that the deferral standards were met because the arbitrator clearly enunciated the correct *Weingarten* principles by referring to and incorporating the explanation from a similar arbitration award, and he correctly applied the objective standard to a fact-specific inquiry.

B.

The issue before the Board at this time is whether deferral is appropriate, and the General Counsel must show that the award is repugnant to the Act. The fact that the Board may disagree with an arbitrator’s decision is not a sufficient basis for finding the decision repugnant to the Act. *Kvaerner Philadelphia Shipyard*, 347 NLRB 390, 391 (2006); *Smurfit-Stone Container*, supra, 344 NLRB at 659–660. As stated above, under the *Olin* standard, there is no requirement that the arbitration award be totally consistent with Board precedent. *Andersen Sand & Gravel Co.*, 277 NLRB 1204, 1205 (1985); *Martin Redi-Mix*, 274 NLRB 559, 559 (1985). But when an award is not even susceptible to an interpretation consistent with the Act, the Board will not defer to it.¹⁰

¹⁰ For example, in *110 Greenwich Street Corp.*, 319 NLRB 331, 334–335 (1995), the employer disciplined two employees after they parked in front of the building where they worked and displayed signs in their car windows complaining about the employer’s failure to pay them in a timely manner. The Board adopted the judge’s refusal to defer to the arbitrator’s award because the arbitrator’s finding that the display of placards justified the discipline was “misguided” and the award was “not susceptible to an interpretation that is consistent with the employees’ rights to engage in concerted activity under Section 7.” See also *Postal Service*, 332 NLRB 340, 343–344 (2000), enf. 25 Fed.Appx 41 (2d Cir. 2001) (finding deferral inappropriate where employees were terminated for “insubordination” when they engaged in a protected, concerted refusal to work overtime); *Key Food Stores*, 286 NLRB 1056, 1072 (1987) (finding deferral inappropriate where arbitrator upheld discharge of union steward who refused to stop processing

Applying this standard, the Board has refused to defer to an arbitrator’s misapplication of *Weingarten*. In *Ralphs Grocery Co.*, 361 NLRB No. 9, slip op. at 1, fn. 1; 4–8 (2014), an arbitrator found that an employee who refused to take a drug and alcohol test without consulting his requested *Weingarten* representative had not been unlawfully denied his *Weingarten* rights. The judge found that the arbitrator “clearly erred” in finding that the employee was not entitled to consult with a union representative before submitting to the drug test. The judge analyzed Board cases dealing with *Weingarten* rights and drug testing and found that the arbitrator had erroneously distinguished them. The judge acknowledged that the Board does not require the award to be “totally consistent with Board precedent,” but he found that “in this instance, the arbitrator’s decision was totally inconsistent with Board precedent, and cannot reasonably be interpreted consistent with the fundamental purposes of the Act.” 361 NLRB No. 9, slip op. at 8. The judge observed that the employee had an objectively reasonable belief that his employer’s investigation and request to take a drug test could put his job in jeopardy. Accordingly, he found that deferral was inappropriate. The Board agreed.

In this case, too, the arbitrator’s award simply cannot be reconciled with *Weingarten*. The evidence presented at the arbitration hearing shows that the Respondent expressly warned Rodriguez on several occasions during the week leading up to the conversation at issue that working on long-duration calls without calling his local manager (Cooper) was a violation of the work rules and could result in discipline up to termination. There is no dispute that on June 8, Rodriguez worked on a long-duration job without calling Cooper. According to Cooper’s contemporaneous notes, she contacted Rodriguez on June 9 to specifically question him about the June 8 long-duration job, not merely about the GPS-reported stops that he made before that job. And the arbitrator recognized that “Cooper was soliciting information from [Rodriguez] regarding his long-duration job.” Nonetheless, when Rodriguez requested representation, Cooper did not inform him that discipline would not result from his answers to her questions.

The arbitrator, by focusing on Cooper’s subjective intent and failing to recognize the significance of the PIP

grievances during working hours; Board found award repugnant because the discharge was based directly on the steward’s protected concerted activity); *Garland Coal & Mining Co.*, 276 NLRB 963, 965 (1985) (finding deferral inappropriate where arbitrator found president of local union (and chairman of the grievance and safety committees) insubordinate when, in support of the union’s interpretation of the collective-bargaining agreement, he refused a supervisor’s order to sign a memo).

and recent counselings in evaluating how a reasonable employee would perceive the situation, misapplied the principles set forth in *Weingarten* and its progeny. Even assuming that Cooper was only intending to ask about the stops shown on GPS, an intention belied by her contemporaneous notes, Cooper's subjective intentions are irrelevant. The focus of a proper *Weingarten* analysis is the objective evidence: the PIP and the prior counselings (which warned that further work rule violations would result in discipline) and Cooper's failure to inform Rodriguez that the interview would not lead to discipline. An examination of those facts under the proper standard—from the point of view of a reasonable employee rather than the supervisor—requires a finding that Rodriguez's belief that discipline might result from the interview was reasonable under all the circumstances.

Thus, the arbitrator's finding that Rodriguez was not entitled to *Weingarten* representation because his fear of discipline was not reasonable is "palpably wrong." Accordingly, we find, contrary to the judge, that deferral is not appropriate.¹¹

ORDER

This proceeding is remanded to the Regional Director for further appropriate action.

Dated, Washington, D.C. August 19, 2016

Mark Gaston Pearce, Chairman

Kent Y. Hirozawa, Member

Lauren McFerran, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

¹¹ In his brief in support of exceptions, the General Counsel requests, if the Board decides not to defer, that the "matter be set for a de novo hearing on the merits of the case." Accordingly, we shall remand this proceeding to the Region for further appropriate action.

Ami Silverman, Esq., for the General Counsel.

William J. Dritsas, Esq., and *Kamran Mirrafati, Esq.*, for the Respondent.

Judith G. Belsito, Esq., and *David A. Rosenfeld, Esq.*, for the Charging Party.

DECISION

MARY MILLER CRACRAFT, Administrative Law Judge: The stipulated record in this case presents the issue of whether deferral to an underlying arbitration award is appropriate pursuant to *Spielberg Mfg. Co.*, 112 NLRB 1080 (1955), and *Olin Corp.*, 268 NLRB 573 (1984), the cases which set forth the Board's current standards for post-arbitral deferral.¹ I find that deferral is appropriate under those standards because the arbitrator's decision is susceptible of an interpretation consistent with the Act.

PROCEDURAL HISTORY

On June 11, 2010, Communication Workers of America, Local 9588, AFL-CIO (the Union), filed an unfair labor practice charge asserting that Verizon California, Inc. (the Respondent) unlawfully denied employee Brian Rodriguez his *Weingarten*² right to union representation at an investigatory interview which he reasonably believed might result in discipline. Rodriguez was suspended for one day for insubordination when he refused to continue the interview without union representation.

Initially the Region administratively deferred the charge to arbitration.³ On January 17 and February 16, 2012, Respondent and the Union arbitrated the grievance before a neutral arbitrator. The arbitral award, issued on April 7, 2012, concluded there was good cause for the suspension. Categorizing the arbitral award as "repugnant to the Act,"⁴ on December 31, 2012, the region issued a complaint and on February 19, 2013, an amended complaint, alleging a *Weingarten* violation of Section 8(a)(1) and (3). Respondent timely filed answers to the complaint and amended complaint admitting and denying various allegations.

In lieu of a hearing, on November 21, 2013, Respondent moved to adopt the record in the arbitration proceeding and allow the parties to brief the deferral issue. By order of December 12, 2013, I granted the motion. On January 21, 2014, the parties entered into and submitted a stipulation of facts on the deferral issue and on February 14, 2014, the parties submitted their briefs on the deferral issue.

On the entire record and after considering the briefs filed by counsel for the General Counsel, counsels for the Charging Party, and counsels for the Respondent, I make the following

¹ On February 7, 2014, the Board invited filing of briefs by parties and amici in *Babcock & Wilcox Construction Co.*, 28-CA-022625, pending before the Board on exceptions to Administrative Law Judge Jay R. Pollack's decision, JD(SF)-15-12, to consider, inter alia, whether the Board should adhere to, modify, or abandon the current standards for post-arbitral deferral in Sec. 8(a)(1) and (3) cases.

² *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 256-257 (1975).

³ See *Collyer Insulated Wire, A Gulf & Western Systems Co.*, 192 NLRB 837 (1971), and *United Technologies Corp.*, 268 NLRB 557 (1984).

⁴ See *Spielberg*, supra, 112 NLRB at 1082; *Olin*, supra, 268 NLRB at 574-574.

findings of fact and conclusions of law.

FINDINGS OF FACT

JURISDICTION AND LABOR ORGANIZATION STATUS

Respondent is a corporation with offices and places of business located at 1400 E. Phillips Blvd., Pomona, California and other locations. It is engaged in providing telephone communications and related services. Annually, Respondent derives gross revenues in excess of \$100,000 and purchases and receives goods at its Pomona facility valued in excess of \$5000 directly from points outside the State of California. Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. Respondent admits and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act. Thus I find that this dispute affects commerce and that the Board has jurisdiction of this case pursuant to Section 10(a) of the Act.

THE ARBITRATION HEARING

Testimony at the hearing established that Rodriguez, a field technician II working from the Respondent's Pomona California yard, installs and repairs customer communications equipment and systems. His immediate supervisor is Pomona yard local manager Brenda Cooper.

June 2 PIP: On June 2, 2010,⁵ Rodriguez was placed on a performance improvement plan (PIP) which included various targeted objectives. One objective was a requirement that he improve productivity (JPD or jobs per day) and another was that he contact his manager on all long-duration jobs, that is, jobs which require over 1.8 hours to complete. The purpose of a PIP, according to Cooper, is to bring an employee up to objectives such as number of jobs per day. In her team of 17 technicians, 6 of them were on PIPs.⁶ In 2009, Rodriguez was placed on a PIP to improve his productivity. Cooper took him off the PIP when she saw some improvement although Rodriguez did not achieve the PDA set for him in the 2009 PIP.

June 3 failure to call in on long-duration job: In any event, with the June 2010 PIP in place, on June 3, Cooper counseled⁷ Rodriguez regarding failure to call her when he was working on a long-duration job the prior day. Rodriguez recalled the counseling:

I got called in with a union rep and I didn't call [Cooper] on the June 2nd to let her know that I had a long-duration ticket, so this basically tells me – she notified me anything that takes me two hours or longer, it's an expectation and a directive. . . . If I don't follow any of those guidelines, it could lead to discipline up to termination.

Forty-five minute discussion with Cooper on morning of June 8: Rodriguez testified that Cooper questioned him at length during the morning of June 8 about "my stops and every-

thing from the day before [June 7]. . . . I was upset that she was constantly harassing me every day. I mean, I came in that morning to order shirts just like everybody else and I stayed over 45 minutes just to answer questions. So honestly, I didn't want to talk to her."

Rodriguez' long-duration job of June 8: After spending 45 minutes with Cooper in the morning of June 8, Rodriguez worked a long-duration job that afternoon. Cooper knew that Rodriguez would be on this long job and an extra ticket was written to cover the long-duration job. Rodriguez did not call in during the June 8 long-duration job.

Before work on June 9, Rodriguez is instructed by the Union regarding Weingarten right: Rodriguez, concerned about how long the job on June 8 took and his failure to call Cooper, met with a Union representative before work the following morning and received information about his *Weingarten* right which he understood to mean: "[I]f I felt that a conversation with management or a local manager could lead to discipline, that I had a right to ask for union representation."

Rodriguez asserts his Weingarten right during a phone call with Cooper on June 9: On June 9, Cooper noted that her supervisor summary report (SABIT report) for June 8 contained GPS information that Rodriguez made two stops before arriving at the previously arranged long-duration call. Cooper needed an explanation for the two stops that Rodriguez made. Cooper left a message for Rodriguez around 1:45 p.m. requesting that he call her. Rodriguez returned the call five minutes later. Cooper asked Rodriguez to explain the stops he made prior to arrival at the long-duration job the previous day and Rodriguez responded that he did not feel comfortable discussing the matter without a Union representative.

From Cooper's perspective, she just wanted an explanation for the two stops before the long-duration stop of June 8. She testified that she frequently called technicians on her team, including Rodriguez, for explanations which she needed to complete her daily reports. Rodriguez agreed that he had these calls on many occasions and was not disciplined but this time he did not want to answer because he had already been warned on June 3 about failure to call in. Rodriguez admitted, though, that Cooper did not ask him about failure to call in. Her questions were about the two stops and about the total length of the job. In any event, Cooper told Rodriguez that she just needed to know what those stops were so she could complete her report. Rodriguez responded that he had been told by the Union not to talk to Cooper.⁸

Cooper agreed that she did not tell Rodriguez that the conversation would not lead to discipline. Cooper took both contemporaneous notes and later completed a more formal notebook entry regarding the conversation with Rodriguez. The contemporaneous notes state, "don't feel comfortable talking to supervisor," "won't talk to me," "refused w/o union," and "de-

⁵ All further dates are in 2010 unless otherwise referenced.

⁶ Rodriguez was on a prior PIP in 2009 which had a production notation, "Move to steps of discipline if required improvement is not met." The 2010 PIP did not have such a notation.

⁷ According to Cooper, counseling, discussing, and coaching all mean basically talking to the employee and are non-disciplinary actions.

⁸ Rodriguez was asked whether subjectively he was concerned about the PIP when he contacted the Union on June 9. His testimony is somewhat confusing on this point in that he initially said he was not and then said he was. However, in his view the PIP was a disciplinary action. Chief Steward Bonilla, who met with Rodriguez early on June 9 and told him about his *Weingarten* rights, described Rodriguez as distraught.

nied to involve union.” Cooper’s later notes regarding the conversation are more detailed and state in part,

Called [Rodriguez] to review 6/8 JPD (1) ticket . . . [Rodriguez] stated he didn’t feel comfortable talking to supervisor without union rep. Explained to [Rodriguez] this is the detail I need for my SABIT call + he needs to explain long duration tickets as stated on PIP/works. [Rodriguez] stated he was instructed by Union D. Goodwin not to talk to me without a union rep. I denied to involve union when getting details of a long duration ticket – just normal conversation.

Cooper suspends Rodriguez for insubordination: Cooper testified that she had conducted investigatory interviews which might lead to discipline and her practice was to call the Union herself before conducting the meeting. She recalled such an incident in 2010 involving Rodriguez. However, on June 9, Cooper told Rodriguez that his refusal to answer her question constituted insubordination. She requested that Rodriguez return to the yard where she would have a Union representative present. When Rodriguez returned to the yard later on June 9, Cooper suspended him for one day for insubordination for refusal to explain information on a job ticket. Cooper’s notes of the suspension meeting reflect she reiterated he was being suspended for refusal to answer questions about a job without a Union representative. The suspension letter states in part,

In the afternoon of June 9, 2010 you were contacted by management for information on a job ticket from June 8, 2010. You responded to your manager that you would not speak to management without a union representative present. You were informed that this was not an investigation or disciplinary meeting; management was questioning only what you did on the job ticket from the day before. You were advised that your failure to provide management information would be considered insubordination; you continued to refuse to speak to management without a union representative present.

Contractual and Handbook Provisions

Memorandum of Agreement Global Positioning System (GPS) provides that if management identifies a possible work rule infraction through GPS, the possible infraction will be discussed with the employee and, if the infraction did occur, coaching will be offered to correct the behavior. If there are further infractions identified through GPS, the company and the Union meet to discuss the infraction. If there is a third infraction identified through GPS, disciplinary action may be taken. According to Cooper, coaching is not a disciplinary action.

Pursuant to Respondent’s applicable work rules, field technicians are required to call their local manager if a job takes over 1.8 hours to complete. The handbook containing this and other work rules further provides that failure to adhere to the work rules could subject the technician to disciplinary action up to and including termination. Cooper testified at that failure to adhere to the call-in requirement for jobs which take over 1.8 hours to complete (long duration jobs) is a work rule which could subject the technician to such disciplinary action. However, she added that she has never disciplined any employee for violation of this rule and she is not aware of any employee being disciplined for failure to call on a long-duration job.

Respondent introduced another arbitration award (the Walker award) involving their Newbury Park employee Wanda Walker, who was suspended for insubordination for refusal to participate in an investigatory meeting without a *Weingarten* representative. The Walker award was offered as directly on point and as justifying the discipline imposed on Rodriguez.

THE ARBITRATOR’S AWARD

The parties’ agreed-upon statement of the arbitration issue was, “Did [Respondent] have just cause to suspend [Rodriguez] on June 9, 2010? If not, what is the appropriate remedy?” The arbitrator, Philip Tamoush (the Arbitrator), found just cause and upheld the suspension. His conclusion was as follows:

This case is fairly straightforward and really must be determined based on the “rule of reasonableness.” Here, the Union’s argument is that whenever an employee subjectively believes that a discussion with Management could result in discipline, then he has a right to Union representation. In its extreme, this could mean every employee, at all times, when receiving a communication, whether orally or in writing, from a supervisor or manager could refuse to respond. Some employees, perhaps have such a “guilt complex” that they unreasonably believe that discussion could result in discipline. Here, Cooper’s testimony was too credible and believable regarding her attempt to obtain objective information with regard to her report-writing responsibilities. While in fact, discipline can result in discussions with employees, that does not give rise to an obligation by Management or a right by employees to have Union representation. The *Weingarten* criteria and standards are laid out in the detailed exposition of Arbitrator William Petrie in [the Walker award] that the Under-signed adopts his rationale and discussion specifically regarding *Weingarten* and attaches it to this award so that the reader, whether the parties or NLRB representatives, can incorporate his reasoning in their analysis as well.

In summary of his conclusions on this matter, the Under-signed believes the Company exercised its rights reasonably in denying Rodriguez Union representation when Cooper was soliciting information from him regarding his long-duration job. The expectation that he might be disciplined as a result of Cooper’s inquiry was unreasonable, considering all of the facts as presented. The grievance will be denied.

In the Walker award, arbitrator Petrie quoted extensively directly from the Court’s decision in *Weingarten*: “The ‘reasonableness’ of an employee’s belief that discipline might result will be determined ‘by objective standards under all of the circumstances of the case.’” Thereafter, arbitrator Petrie stated,

On these bases, therefore, the outcome of this proceeding depends upon the presence or absence of “objective standards” establishing the Grievant’s reasonable belief that her participation in the requested meeting with management . . . could have led to discipline.”

Arbitrator Petrie concluded that no objectively-based, reasonable belief existed. He found after assessing demeanor credibility that the grievant’s testimony was varying, contradictory, confusing, and implausible and did not establish a reasonable

belief that discipline would result from the interview.

Refusal to Defer

Current deferral standards as articulated in *Spielberg*, supra 112 NLRB at 1082, and *Olin*, supra, 268 NLRB at 573–574, require that in order to defer to an arbitration award:

1. The arbitration proceeding itself must be fair and regular.
2. All parties agree to be bound by the arbitral award.
3. The arbitrator must have considered the unfair labor practice at issue.
4. The arbitral award is not clearly repugnant to the Act's purposes and policies.

The region relied on the fourth criteria, repugnance to the Act, in refusing to defer. Thus the complaint and the amended complaint state, "About April 17, 2012, an arbitral award issued, which is repugnant to the Act because the arbitrator misapplied or incorrectly enunciated statutory principles as well as failed to consider fully the import of discriminate-Rodriguez's PIP on the issues before him."

Analysis

The parties agree and I find that the first three deferral criteria have been met

All parties agree that the arbitration proceeding was fair and regular and I find that it was as well. Respondent and the Union were represented by counsel at the proceeding. They were given full opportunity to present, question, and cross-examine witness and to submit documents in support of their positions.

There is no dispute that all parties agreed to be bound by the arbitral award rendered pursuant to the parties' collective-bargaining agreement, articles 12 and 13. As to the third criteria, consideration of the unfair labor practice at issue, the arbitrator acknowledged the factually parallel *Weingarten* issue and was aware that the NLRB had deferred further proceedings to the parties' arbitration because the Union advised him of this fact and asked that he send a copy of his award to the NLRB. The arbitrator was presented with the facts generally relevant to the unfair labor practice. Finally, in acknowledgement of the unfair labor practice issue before him, the arbitrator ruled on the *Weingarten* issue. Thus, I find the arbitrator considered the unfair labor practice at issue.

The arbitral award is not clearly repugnant to the Act's purposes and policies

Although the Board has been urged to revise its standards for post-arbitral deferral in order to provide greater protection to employee statutory rights,⁹ the standards set forth in *Olin*, supra, 268 NLRB at 574, guide me in determining whether the arbitral award is clearly repugnant to the Act's purposes and policies:

And, with regard to the inquiry into the "clearly repugnant" standard, we would not require an arbitrator's award to be totally consistent with Board precedent. Unless the award is

"palpably wrong," i.e., unless the arbitrator's decision is not susceptible to an interpretation consistent with the Act, we will defer.

The "clearly repugnant" standard has been harshly criticized as lacking in theoretical underpinning and allowing the Board to arbitrarily defer when it approves of the award but to withhold deferral when it does not approve.¹⁰ However, under the clearly repugnant/palpably wrong standard, the Board sometimes states that it is of little or no import that the Board or another arbitrator might have reached a different result.¹¹ Given the evidence presented at the arbitration hearing, it is possible to reach a different result than the Arbitrator. However, this fact alone does not render the award clearly repugnant or palpably wrong. In analyzing the "clearly repugnant" aspect, I am mindful that the party opposing the arbitration award has the burden to show that the award is inappropriate.¹² However, after consideration of the grounds urged for finding the award "clearly repugnant," I find the award is susceptible of an interpretation consistent with the Act.

- Incorporation of another arbitration award by reference did not render the award clearly repugnant to the Act.

As the General Counsel and the Union point out, the Arbitrator incorporated the Walker decision by reference. The General Counsel and the Union argue that incorporation of the Walker decision was not just as to the *Weingarten* discussion but was additionally adopted as the substantive rationale for finding that Rodriguez did not have an objectively reasonable belief that the interview might lead to discipline. Although I agree that the facts of the two cases are markedly different, I disagree that the Arbitrator relied on anything other than the Walker discussion of legal precedent under *Weingarten*.

In my view the Arbitrator's decision is capable of being understood as adopting only the *Weingarten* discussion at pages 19–21 of arbitrator Petrie's decision. The Arbitrator stated, "The *Weingarten* criteria and standards are laid out in the detailed exposition of [arbitrator Petrie] . . . that the Undersigned adopts his rationale and discussion specifically regarding *Weingarten* and attaches it to this award so the reader . . . can incorporate his reasoning in their analysis as well." (emphasis added). It is possible to read this rather complex sentence to state that the Arbitrator did not adopt the conclusion that grievant Walker's discipline was justified and apply that to grievant Rodriguez. Rather, a reasonable reading of the sentence is that the Arbitrator incorporated the summary of *Weingarten* law only and then applied his own *Weingarten* analysis to the Rodriguez facts. Thus, I reject this basis for finding the award is palpably wrong.

- Given the Arbitrator's credibility findings, his award may be understood as finding that Rodriguez did not

⁹ See GC Memorandum 11-05 (January 20, 2011), Guideline Memorandum Concerning Deferral to Arbitral Awards and Grievance Settlements in Sec. 8(a)(1) and (3) cases.

¹⁰ *Plumbers and Pipe Fitters Local 520 v. NLRB*, 955 F.2d 744, 756-757 (D.C. Cir.), cert. denied, 506 U.S. 817 (1992).

¹¹ See, e.g., *Kvaerner Philadelphia Shipyard, Inc.*, 346 NLRB 390, 394 (2006) (the Board or another arbitrator could have made another finding).

¹² *Turner Construction Co.*, 339 NLRB 451 (2003).

have a reasonable belief that explaining the two stops shown on GPS prior to the stop at the long-duration location would lead to discipline.

The General Counsel and the Union further argue that the Arbitrator's decision was palpably wrong because Rodriguez had a reasonable belief that speaking to Cooper might result in discipline. According to the General Counsel and the Union, this reasonable belief was based on the PIP, which targeted calling in on long-duration jobs, and failure of Cooper to state that no discipline would result. The General Counsel and the Union assert that the Arbitrator ignored these facts.

Although the General Counsel and the Union, using their own credibility preference, make a solid argument for finding an objectively based reasonable belief that discipline could result, this is not the appropriate inquiry regarding deferral. Rather, the argument attempts to second guess the Arbitrator's credibility resolutions. The appropriate question is whether the award is susceptible of an interpretation consistent with the Act. The Arbitrator found Rodriguez' expectation "that he might be disciplined as a result of Cooper's inquiry regarding two stops shown by GPS was unreasonable, considering all of the facts as presented." In fact, the Arbitrator specifically credited Cooper's testimony: "Here, Cooper's testimony was too credible and believable regarding her attempt to obtain objective information with regard to her report-writing responsibilities."

- The Arbitrator's standard for determining the *Weingarten* issue is consistent with the Act.

Reducing the Arbitrator's award to its simplest, it may be understood to discredit Rodriguez and to credit Cooper:

Some employees, perhaps have such a "guilt complex" that they unreasonably believe that the discussion could result in discipline. Here, Cooper's testimony was too credible and believable regarding her attempt to obtain objective information with regard to her report-writing responsibilities."

The General Counsel and the Union contend that the award misapplied the facts and law and reached a conclusion that cannot be supported by any reasonable interpretation of the Act.¹³ However, based on the Arbitrator's credibility finding, the award may be understood to find that Rodriguez' belief that discipline might result was unreasonable because the entire

¹³ The General Counsel specifically cites to two statements in the arbitration award asserting that these statements represent the Arbitrator's misunderstanding of *Weingarten*. I find that both of these statements (operations of Company would suffer immeasurably if employees could demand union representation in every conversation with management; proper *Weingarten*-oriented investigation occurred when Rodriguez given suspension when accompanied by union representative) were summaries of Respondent's contentions rather than attributable to the Arbitrator.

tenor of Cooper's credited testimony is that she only wanted the information about two stops shown by GPS in order to complete an internal report. The GPS information she sought had nothing to do with Rodriguez' PIP or his prior warning, both of which are in any event non-disciplinary according to Cooper's credited testimony.

I reject the General Counsel's contention that the Arbitrator had a "basic misunderstanding" of *Weingarten*. The Arbitrator stated,

Here, the Union's argument is that whenever an employee subjectively believes that a discussion with Management could result in discipline, then he has a right to Union representation. In its extreme, this could mean every employee, at all times, when receiving a communication, whether orally or in writing from a supervisor or manager could refuse to respond.

Although the General Counsel and Charging Party argue that these two sentences are susceptible of being understood to incorporate a subjective, industry-disabling standard into the reasonable belief component of *Weingarten*, I find these sentences merely reject the Union's argument regarding introducing subjectivity into the *Weingarten* standard. Clearly, the Arbitrator did not adopt a subjective standard.¹⁴

CONCLUSION OF LAW

Having accepted the stipulated record including the transcript of proceedings before the Arbitrator as well as the Arbitrator's award, I find that the award is not clearly repugnant to the Act pursuant to the standards enunciated in *Spielberg*, supra, and *Olin*, supra. Accordingly, I defer to the Arbitrator's award and dismiss the complaint.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended¹⁵

ORDER

The complaint is dismissed.

Dated, Washington, D.C. March 20, 2014

¹⁴ Were the Arbitrator's statement ambiguous, I would nevertheless find it susceptible of an interpretation consistent with the Act. See, e.g., *Bell-Atlantic-Penn*, 339 NLRB 1084, 1085 (2003)(arbitrator's award need not be totally consistent with Board precedent to warrant deferral); *Postal Service*, 275 NLRB 430, 432 (1985) (in order to foster collective and cooperative resolution of workplace disputes, Board will defer if award is susceptible of interpretation consistent with Act).

¹⁵ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.